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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 589

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

I. Contrary to the appellees' contentions, this appeal presents substantial questions of general public importance

Little or no argument should be necessary to prove that the questions presented in this appeal are substantial and of general public importance if it can be demonstrated, as we think it can, that the district court, in its decision to set aside and enjoin the Commission's order, misapprehended and grossly misapplied the standard pre-

scribed by this Court for determining the substantiality of evidence in a case such as this; or if it can be shown, as we believe it can, that the district court, in holding the evidence legally insufficient, grounded its decision upon clearly erroneous legal concepts as to the evidence which is required to sustain an order of the type here involved.

As set forth in detail in the Commission's Statement as to Jurisdiction, the Commission has found it necessary, since the end of World War II, to authorize several general increases in interstate freight rates to meet the railroads' increasing operating costs. A number of the state commissions have failed or refused to permit intrastate rates to bear their fair share of such costs, with the result that there have been numerous proceedings under Section 13 (4) of the Interstate Commerce Act in which the Commission, after hearings, has ordered increases in intrastate rates for the purpose of removing discrimination against interstate commerce.

Almost without exception during the past ten years, the Commission's orders thus increasing intrastate rates have been sustained by the courts when attacked. Among recent such cases are:

King v. *United States,* 344 U. S. 254;
Montana v. *United States,* 117 F. Supp. 174 (after remand, 344 U. S. 905);

Tennessee v. *United States,* 113 F. Supp. 634, aff'd., 346 U. S. 891, reh. den., 346 U. S. 928;

Louisiana v. *United States,* 125 F. Supp. 180, aff'd., 348 U. S. 885, reh. den., 348 U. S. 921;

North Carolina v. *United States,* — F. Supp. —, decided February 11, 1955.

Similar issues are necessarily involved in all these cases arising under Section 13 (4), including, in almost every instance, the question whether state refusal to permit increases in intrastate rates causes discrimination against interstate commerce. Obviously, all such Commission orders should be adjudged by the same standards of judicial review. If, as we contend, an entirely different standard was applied in this case, than that applied by the Supreme Court and by district courts in other such cases, the result would be grossly unfair to carriers and shippers alike, and the Commission would be placed under a much more difficult if not an impossible burden in carrying out its statutory duty to remove unjust discrimination against interstate commerce. If that is this case, as we insist it is, the questions presented are indeed substantial and generally important, and the judgment of the district court should not be permitted to stand.

II. It is clear from the opinion of the district court that it misapprehended and grossly misapplied the standard for determining the substantiality of the evidence. A review of the evidence by this Court is not required

In the motion to affirm, filed on behalf of the shipper appellees, it is asserted (p. 3) that the Commission and the railroad appellants "seek a re-review of the evidence" by this Court. The Mississippi Commission makes the same contention in its motion. Both are incorrect. It is unnecessary for this Court to review the evidence, for the district court's opinion shows clearly on its face that the court misapprehended and misapplied the standard of judicial review laid down by this Court in *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474.

It is true that the district court *said* it was following the *Universal Camera* doctrine, but the question we raise on this appeal is whether it did in fact follow it, or did it misapprehend and misapply that doctrine when it held that the Commission's order was not supported by substantial evidence? The determination of that question does not require a reexamination of the evidence; it requires only that this Court consider and determine, from the district court's opinion, whether what that court did was proper under the law.

This Court stated in *Universal Camera* (at p. 488) that the requirement of the Administrative Procedure Act for a reviewing court to canvass the whole record in an administrative proceeding

was "not intended to negative the function of an [agency] presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." This Court has many times said that the Interstate Commerce Commission is such an agency, "appointed by law and informed by experience." *Illinois C. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454; *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 522.

In *Universal Camera* the Court also said that the requirement for canvassing the whole record does not "mean that as to matters not requiring expertise a court may displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" 340 U. S. 488.

It abundantly appears from the opinion of the district court that it did negative the Commission's function as the evidence-weighing and fact-finding body, with respect to the principal factual issues in the case, and that it did displace the Commission's choice "between two fairly conflicting views" as to the reasonableness of the considered intrastate rates and whether they were unjustly discriminatory against interstate commerce. Otherwise stated, the district court substituted its judgment for that of the Commission

on matters peculiarly within the province of the Commission to decide.

An example of the district court's misapplication of the prescribed standard and of its misconception of the function of a reviewing court is the following statement which appears in its opinion (at p. 809 of 124 F. Supp.):

> * * * In fixing reasonable rates competition is one of the elements to be considered and is frequently controlling. [Citation.] In determining the legal question as to whether the evidence amounts to substantiality and in adjudicating whether there was substantial evidence or not, *the court likewise must weigh such factors.* * * * [Emphasis added.]

Another instance of the court's exercise of the Commission's function of weighing the evidence is shown by the following excerpt from the opinion (124 F. Supp. 816):

> The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but *their testimony has been fully weighed* in the light of the entire record and proceedings in this cause and when viewed in this light the testimony fails to show substantiality sufficient to uphold the order here under attack and the findings that were made by the Interstate Commerce Commission. * * * [Emphasis added.]

The testimony to which the court was referring was that of rate experts introduced by the railroads to the effect that the proposed increase in intrastate rates in Mississippi would produce additional revenue for the carriers of more than $550,000 per year. On the testimony of those experts, the Commission made a finding to that effect (finding No. 5, 291 I. C. C. 64). Yet the district court said of the evidence supporting the revenue finding (124 F. Supp. 816):

> * * * The testimony upon this proposition is exceedingly weak. * * * The evidence to support this finding when weighed in the light of the prevailing rule of law is not sufficient to amount to substantial evidence.

We submit that the only conclusion properly to be drawn from the court's rejection of this evidence and of the Commission's finding thereon is that the court was under the misapprehension that its function was to try the case *de novo*, judge the weight to be given each portion of the evidence, and make its own appraisal of the facts, without regard to the findings already made by the Commission as the fact-finding body. In the *Jersey City* case, *supra*, this Court, speaking through Mr. Justice Jackson, said of the weight to be given the opinion of the Price Administrator as to the possibly inflationary effect of an

increase in fares ordered by the Commission (322 U. S. 522):

> * * * Who, then, in this case is to judge the weight to be given such a factor? The opinion of the Administrator is not, as we have pointed out, mandatory on the Commission. Nor is such an economic judgment the function of the courts unless all that has been established in administrative law concerning the limitations on judicial review to be thrown overboard. *The decision of such a matter by the Commission is clearly not reviewable by a court because it thinks differently of the weight that should be accorded some factors in relation to others.* [Emphasis added.]

The opinion of the district court also shows that it misapplied the prescribed rules of judicial review by basing its judgment on evidence not in the record before it, as opposed to the substantial record evidence upon which the Commission's findings were based. We refer to the court's repeated references to findings which it said had been made by the Mississippi Commission, but made, we emphasize, on evidence not in this record and not before either the Interstate Commerce Commission or the district court. These excerpts from the opinion are illustrative of the point we are making:

> * * * The fixing of intrastate rates is primarily the duty of the state commission and the record in this case demonstrates

> that the Mississippi Commission gave great study and investigation and heard much testimony before the Commission itself and not through an examiner. * * *. (124 F. Supp. 814.)
>
> * * * The findings of a state commission which is familiar with such conditions in the state, with the location of competing highways and other forms of carriers, when its opinion differs from the Interstate Commerce Commission's findings, detracts heavily against the findings of the Interstate Commerce Commission, whose testimony is taken before an examiner. * * * (124 F. Supp. 815.)
>
> * * * The record shows in this case that the Mississippi Commission was thoroughly familiar with the competition prevailing and with the location of the sites for gravel, the location of the highways, and as a matter of fact in better position to determine the effect of competition upon the carriers than is the Interstate Commerce Commission, * * *. (124 F. Supp. 816.)

From these three excerpts it should be abundantly clear that the district court was quite willing to accept, and did accept and adopt, the Mississippi Commission's findings on factual questions in lieu of findings thereon by the Interstate Commerce Commission, even though the record before the court contained none of the evidence on which the state commission had made its findings but did contain all of the evidence

supporting the findings made by the Interstate Commerce Commission.

Considering all these indications of the district court's departure from the prescribed standard of judicial review, we feel warranted in saying that the court's decision should not be permitted to stand "unless all that has been established in administrative law concerning the limitation on judicial review [is] to be thrown overboard." *Jersey City* case, *supra.*

III. The district court's opinion shows that it based its decision on errors of law as to the type of evidence required to sustain a Section 13 order

In the Commission's Statement as to Jurisdiction, on pages 17–20, we pointed out and discussed three separate statements by the district court in its opinion which to us were and are erroneous as matters of law. The appellees, in their motions to affirm, without attempting to defend the legal correctness of two of the three statements we quoted, appear to take the position that those two statements were no part of the basis for the court's decision. A careful reading of the opinion will show, however, that these misconceptions of the law by the district court were largely responsible for its conclusion that the Commission's findings were not supported by substantial evidence.

Here is what the district court said as to the lack of evidence of segregation of rail operating

costs and revenues as between interstate and intrastate operations (124 F. Supp. 815):

> * * * *There must be a finding* based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. *There was no separation made by the railroads of their revenues, expenses and properties* as between interstate and intrastate operations. * * * [Emphasis added.]

If this statement by the court does not mean that it thought that evidence as to segregation of costs and revenues was essential to the support of a rate-increase order under Section 13 (4), we cannot understand why the court made the statement. It could hardly have indicated more clearly that the lack of such evidence was one of the reasons for holding that the total evidence was less than sufficient to support the order increasing the rates.

That no such evidence of cost and revenue segregation is required under the circumstances of this case is conclusively shown by the authorities cited on page 17 of the Commission's Statement as to Jurisdiction.

Another misconception of the law by the district court appears in its listing of numerous

factors which it considered necessary to sustain an order under Section 13 (4), as follows (124 F. Supp. 813):

> In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13 (4) of the Act, *it must be shown,* among other things, * * * (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; * * *. [Emphasis added.]

If plain, unambiguous words mean what they say, this statement by the district court means that it considered as one of the prerequisites to the validity of the Commission's order that there be evidence of injury to interstate shippers as a result of the disparity between the interstate and the intrastate rates. Not any of the appellees contend, however, that any such evidence was legally necessary in this case, or that the court's statement was in any sense legally correct. It was obviously incorrect, and a false basis on which to set aside the Commission's order, for the reason that the order was grounded, not upon prejudice and preference to shippers, but upon discrimination against interstate commerce.

Except for referring to what we said in our Statement as to Judisdiction (pp. 18–20), we shall not lengthen this brief by again discussing the district court's holding with respect to evidence of passenger deficits. We understand that ques-

tion is being treated fully in the brief which the appellant railroads are filing in No. 588, and we agree with the argument there made.

CONCLUSION

For the reasons stated, we submit that the Court should deny the Motions to Affirm and should reverse the judgment of the district court.

Respectfully submitted.

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